

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:23-cv-10511-WGY  
4 Vol 1, Pages 1 - 77

5  
6 UNITED STATES OF AMERICA, et al,  
7 Plaintiffs

8 vs.

9  
10 JETBLUE AIRWAYS CORPORATION, et al,  
11 Defendants

12 \*\*\*\*\*

13  
14 For Bench Trial Before:  
15 Judge William G. Young

16  
17 United States District Court  
18 District of Massachusetts (Boston)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Tuesday, November 7, 2023

22 \*\*\*\*\*

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24 Official Court Reporter  
25 United States District Court  
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(Continued.)

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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McINTYRE GARDNER (Continued.)

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1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE COURT: If you would remind the witness.

4 THE CLERK: Mr. Gardner, you recall you are under  
5 oath?

6 THE WITNESS: I do.

7 THE COURT: You may continue.

8 MS. MARKEL: Thank you, your Honor.

9

10 DIRECT EXAMINATION BY MS. MARKEL: (Continued.)

11 Q. Good morning, Mr. Gardner.

12 A. Good morning.

13 Q. Since you left the stand yesterday, have you  
14 spoken with anyone about the substance of your testimony  
15 either from yesterday or for today?

16 A. No.

17 Q. So this morning I'd like to start with Spirit's  
18 negotiations with Frontier and Allegiant back in 2019.

19 Back in 2019, Spirit was considering combining  
20 with another ULCC, right?

21 A. Yes.

22 Q. And to that end, Spirit had discussions with  
23 Frontier and Allegiant back in a 2019, right?

24 A. I believe that's correct, yes.

25 Q. And those were the only two airlines that Spirit

1 engaged in discussions with at the time, right?

2 A. Yes.

3 Q. And Spirit's board ultimately decided against  
4 moving forward with either Frontier or Allegiant back  
5 then?

6 A. In 2019, yes.

7 Q. And Spirit's board made the decision to focus on  
8 its standalone plan rather than pursue any strategic  
9 combination at that time, right?

10 A. Yes.

11 Q. Okay. So now let's talk about Allegiant very  
12 briefly.

13 So at this time please direct your attention to  
14 the document marked BJC in your binder.

15 A. (Turns.) Okay.

16 Q. Do you recognize this to be an agenda -- if you  
17 look at the first page, an agenda of materials prepared  
18 for a board meeting on August 24th, 2021?

19 A. Yes.

20 Q. And if you look at the agenda, it looks like you  
21 opened that meeting, right?

22 A. I did.

23 MS. MARKEL: Your Honor, at this time I move for  
24 the admission of BJC in evidence.

25 THE COURT: Any objection?

1 MR. COHEN: Your Honor, I think the document has  
2 hearsay within hearsay under 805. I don't know if the  
3 witness is going to be directed to that. But beginning  
4 at --

5 THE COURT: Well she's offering -- she's offering  
6 a document. Now I'm assuming its authenticity, it's an  
7 admission by Spirit, and your concern is material in  
8 there that you say is, um, hearsay within hearsay.

9 Is that right?

10 MR. COHEN: Yes, your Honor. And just to be  
11 clear, I'm not objecting to the document also as a  
12 business record of -- but it's hearsay within hearsay.

13 THE COURT: All right. Well then if she's -- if  
14 you have no objection to the document, then I'll admit  
15 the document, which means that anything in here is --  
16 has probative weight if, um -- if I find it persuasive  
17 of something relevant.

18 Is that all right with you?

19 MR. COHEN: No, your Honor, I --

20 (Laughs.)

21 THE COURT: No. Well then the default is on you  
22 to point out what I ought not look at.

23 MR. COHEN: Yes.

24 I would say the beginning at Bates page that ends  
25 in 947, it's, I suspect, where we're going on the slides

1 that follow. All of the material around Allegiant is  
2 compiled from data that would not be native to Spirit.  
3 It has to be --

4 THE COURT: I follow that. All right. Now I  
5 understand the objection.

6 What -- um, do you want that data?

7 MS. MARKEL: Yes, your Honor.

8 THE COURT: And how can you get it in under the  
9 rules?

10 MS. MARKEL: Um, if you look at the page ending in  
11 944, it appears that this competitive analysis was  
12 prepared by Spirit. It's in a Spirit presentation.  
13 These are Spirit admissions. Spirit put this together.

14 THE COURT: I understand that, but -- wait a  
15 minute. Here's his point.

16 His point is that the data that had to come from  
17 somewhere, it came from Allegiant, and I'm not  
18 Allegiant. We don't know where the data came from.

19 Now this may be what Spirit thought about  
20 Allegiant, but it does not prove anything about  
21 Allegiant.

22 Now are you okay with my taking it with that  
23 limitation?

24 MS. MARKEL: Yes, your Honor.

25 THE COURT: And you have no problem with that?



1 MR. COHEN: No, your Honor.

2 THE COURT: All right. Then BJC is admitted in  
3 evidence, it will be Exhibit -- and I need the Clerk's  
4 help here -- 679, as limited. And you may proceed.

5 MS. MARKEL: Okay.

6 (Exhibit 679, marked.)

7 Q. So, Mr. Gardner, if you turn to page -- the page  
8 ending in 944, and it also has the Page 15 on the  
9 bottom, and it's called, "Competitive Analysis."

10 Do you see that?

11 A. Not yet. I'm getting there. (Turns.) I do.

12 Q. Okay. So this section is a Competitive Analysis  
13 that Spirit put together on Allegiant, right?

14 A. Um, yeah, I assume so.

15 Q. Okay. So turn to Page 950 in your binder.

16 A. (Turns.)

17 Q. And that slide should be titled "Allegiant has  
18 remained much smaller than Spirit."

19 Do you see that?

20 A. I do.

21 Q. And do you see at the right-hand side of the chart  
22 that Spirit was, in Spirit's estimation, "158 percent  
23 larger than Allegiant as of 2019 in terms of ASMs,"  
24 right?

25 A. That's what this says, yeah.

1 Q. And this also shows that in Spirit's estimation,  
2 Spirit was growing much more quickly than Allegiant,  
3 right, if you look at the left-hand side?

4 A. Um, yes, that's what it says.

5 Q. Okay. So now let's turn to Page 955.

6 A. (Turns.)

7 Q. And so this is titled "Model focuses on network  
8 breadth, peak frequency."

9 Do you see that?

10 A. I do.

11 Q. Okay. So take a look at the second bullet point  
12 that states, "Over 500 nonstop markets this summer, only  
13 15 -- about 15 percent have a competitor."

14 Do you see that?

15 A. I do.

16 Q. And so that was Spirit's assessment of Allegiant,  
17 right?

18 A. Um, of their network market here, I think so. I  
19 can't read the footnote that is referenced in that  
20 point. But it's to, um -- maybe I can read it on the  
21 screen, but "markets on a head-to-head airport basis  
22 approximately." And what does that say, "one-third on a  
23 metro basis"? I'm just trying to make sure I understand  
24 the -- I think what you say is correct.

25 Q. Okay. And so if you look at the fourth bullet

1 point now, that states "Only 6 percent of markets  
2 operate daily or greater." So that was Spirit's  
3 assessment of Allegiant, right?

4 A. Um, of the markets that operate daily or greater,  
5 yeah.

6 Q. Okay. So now take a look at the page ending in  
7 981.

8 A. (Turns.)

9 Q. And let me know when you're there, please.

10 A. (Turns.) Got you.

11 Q. Okay. So this sign is called "Key Financial  
12 Theme," and please direct your attention to, I guess,  
13 the third bullet under "Allegiant Key Plan," which  
14 states "Small city, low-volume market, limited runway  
15 for growth, but at potentially higher unit revenue  
16 level."

17 Do you see that?

18 A. I do.

19 Q. So it was Spirit's assessment that Allegiant had a  
20 limited runway for growth, right?

21 A. Um, yes. Under that model, yes.

22 Q. Okay. Now turn to the next side ending in 982.

23 A. (Turns.) Yup.

24 Q. This was "Spirit Management's Strategic Comparison  
25 of Allegiant and Spirit," right?

1 A. Yes.

2 Q. Okay, take a look at "Network" under "Allegiant"  
3 and under "Spirit."

4 "Whereas Spirit had breadth and depth in this  
5 network, it was Spirit's assessment that Allegiant had  
6 breadth but no depth," right?

7 A. Yes, that was its model.

8 Q. Okay. Now take a look at "Schedule" underneath  
9 that. "Spirit had" -- "It was Spirit's assessment that  
10 Spirit had daily frequencies, unlike Allegiant," right?

11 A. Yes.

12 Q. Now take a look at "Aircraft Utilization." "It  
13 was Spirit's assessment that where Spirit had high  
14 utilization, Allegiant had low," right?

15 A. That's what it says, yeah.

16 MS. MARKEL: Okay, you can put that exhibit aside.

17 Q. And I'm going to, um, pass -- my colleague will  
18 pass up a document that has been marked as BUW.

19 (Hands to witness.)

20 Q. And do you recognize this document?

21 A. (Looks.) I do.

22 Q. This is Spirit's investor update as of October  
23 26th, 2023, right?

24 A. Yes.

25 Q. Okay.

1 MS. MARKEL: At this time I will move this  
2 document in evidence.

3 MR. COHEN: No objection, your Honor.

4 THE COURT: May be received, Exhibit 678 --

5 MS. MARKEL: 680.

6 THE COURT: 680. Thank you.

7 (Exhibit 680, marked.)

8 Q. And so if you direct your attention to the last  
9 two, um, rows here. This shows -- the second-to-last  
10 row shows that, um, there was a 14 percent expected  
11 increase in ASM for the fourth -- sorry, let me say that  
12 again.

13 So the second-to-last row shows that Spirit's  
14 expected ASM increase for the fourth quarter 2023, year  
15 over year, is 14 percent, right?

16 A. That's what it says.

17 Q. And then if you look at the row below that, it  
18 shows it to be 7 percent for the -- for the first  
19 quarter of 2024, right?

20 A. Yes, that's what it says.

21 Q. Okay.

22 MS. MARKEL: You can put that aside.

23 Q. So now I'd like to discuss the more recent  
24 Frontier, Spirit negotiations.

25 Spirit picks up discussions with Frontier in late

1 2021, right?

2 A. Um, summer, I think.

3 Q. The summer of 2021?

4 A. Yeah. Uh-huh.

5 Q. Okay. And on February 5th, 2022, Spirit and  
6 Frontier signed a merger agreement, right?

7 A. We did.

8 Q. And you wrote it in favor of a Spirit, Frontier  
9 transaction, right?

10 A. I did.

11 Q. Now let's fast-forward to the end of March 2022.

12 On March 29th of 2022, JetBlue made a proposal to  
13 acquire Spirit, right?

14 A. I believe that was the date, yes.

15 Q. And Spirit's board met to discuss JetBlue's  
16 proposal, right?

17 A. We did.

18 Q. And ultimately Spirit's board determined that the  
19 JetBlue proposal was not a superior proposal, right?

20 A. Um, correct.

21 Q. And one of Spirit's concerns with JetBlue's  
22 proposal at the time was the ability to run Spirit as an  
23 independent enterprise during the pending approval  
24 process, right?

25 A. That was one of them.

1 Q. Okay. Now let's fast-forward to May of 2022.

2 In May of 2022, JetBlue made a hostile takeover  
3 bid for Spirit, right?

4 A. Yes.

5 Q. Okay. And sitting -- and you are aware that  
6 JetBlue has stated that it intends to convert Spirit's  
7 fleet to JetBlue's fleet, right?

8 A. That's what they say publicly, yes.

9 Q. Okay. And so sitting here today, you would agree  
10 that the conversion of Spirit's aircraft to JetBlue's  
11 configuration would result in higher prices for Spirit  
12 consumers, right?

13 A. Um, ultimately. Their average fares are higher  
14 than ours.

15 Q. Thank you.

16 So now let's turn to Exhibit 105 in your binder.

17 A. (Turns.) 105? Oh, here it is.

18 Q. Yes.

19 A. Got you.

20 Q. And this is Spirit's press release from May 19th,  
21 2022, right?

22 A. It is.

23 Q. And this press release was issued after JetBlue's  
24 tender offer, right?

25 A. Um, yes.

1 Q. Okay. So take a look at the bottom of the first  
2 page continuing onto the second page, and you should see  
3 that you're quoted in this press release. Do you see  
4 that?

5 A. I do.

6 Q. Now let's look at your quote on the top of the  
7 second page. You're quoted as saying, "Based on our own  
8 research and the advice of antitrust and economic  
9 experts, our view is that the proposed combination of  
10 JetBlue and Spirit lacks any realistic likelihood of  
11 obtaining regulatory approval while our company faces a  
12 long and bleak limbo period as we await resolution."

13 Do you see that?

14 A. Yes.

15 Q. Your statement there accurately reflects the  
16 board's determination as of May 19th, 2022, right?

17 A. That was our feeling at the time based on that  
18 offer, yes.

19 Q. And to make that determination, the board relied  
20 on Spirit's own research, right?

21 A. Spirit's own research? Um, yes, it was the  
22 conclusion of the board.

23 Q. And if you look at the beginning of your quote you  
24 wrote -- or you said, "Based on our own research and  
25 advice of antitrust and economic experts."



1 A. Yeah.

2 Q. Okay. And so the board also relied on advice from  
3 Spirit's antitrust and economic experts, is that right?

4 A. Um, yes.

5 Q. Okay, so now let's look at your quote, the next  
6 part of your quote. You write, "In that scenario, a  
7 \$1.83 cent per share reverse rate of pay will not come  
8 close to adequately compensating Spirit's stockholders  
9 for the significant business disruption Spirit will face  
10 during what JetBlue acknowledges will be a protracted  
11 regulatory process."

12 You see that, right?

13 A. I do.

14 Q. And so you were concerned that a regulatory  
15 challenge could result in a significant business  
16 disruption risk for Spirit, right?

17 A. Um, yes.

18 Q. Okay. So --

19 MS. MARKEL: You can put that exhibit aside.

20 Q. And let's turn to the document marked 350 in your  
21 binder.

22 A. (Turns.)

23 Q. And this is a May 23rd, 2022 presentation that is  
24 already in evidence. So I will direct your attention to  
25 Slide 3 on the page ending in 212, which is titled "Is

1 JetBlue purposely downplaying the substantial regulatory  
2 risk?" Let me know when you're there.

3 A. (Pause.) I'm there.

4 Q. Okay. If you look at the second bullet point on  
5 this page, it states, "JetBlue's acquisition removes the  
6 largest low-fare competitor affecting millions of  
7 consumers across the U.S."

8 Do you see that?

9 A. I do.

10 Q. And those millions of consumer are Spirit's  
11 consumers, right?

12 A. Um, yes.

13 Q. Okay. So it's Spirit's position at the time that  
14 this deal would harm millions of Spirit consumers,  
15 right?

16 A. Um, that was a concern.

17 Q. Okay. So now please turn to Slide 6 at Page 215.

18 A. (Turns.)

19 Q. This slide is titled, "Spirit's shareholders lose  
20 in all NEA litigation scenarios."

21 Do you see this? Let me know when you're there.

22 A. I'm there.

23 Q. Okay, great.

24 So this flow chart considers how JetBlue's win or  
25 loss in the NEA trial would affect a JetBlue, Spirit

1 deal, right?

2 A. Yes, at the time.

3 Q. And this flow chart shows that regardless of what  
4 happened with the NEA, "a JetBlue, Spirit deal would  
5 still be a high-fare airline trying to buy a low-fare  
6 airline and raise fares," right?

7 A. That's what this says, yes.

8 Q. Okay. And this also shows that regardless of what  
9 happened with the NEA, Spirit did not believe that this  
10 deal could be consummated at this time, right?

11 A. We were concerned about that, yes.

12 Q. All right. So now if you could turn to Slide 10,  
13 which is called -- it's on the Bates number ending in  
14 219.

15 A. (Turns.)

16 Q. And this slide is called "Let's use common sense."  
17 Let me know when you're there?

18 A. Yes.

19 Q. Okay. So on this chart let's focus on the row  
20 that is labeled "A JetBlue transaction." And now let's  
21 look at what it says under the "Common sense."

22 Next to "Value Disruption" it states, "RTF of  
23 \$1.83 per share does not come anywhere close to  
24 protecting Spirit's shareholders from the business  
25 disruption of a botched M & A transaction. Average

1 market underperformance of 25 percent experienced by  
2 target-to-sale mergers."

3 Do you see that?

4 A. I do.

5 Q. So it's fair to say that Spirit was concerned  
6 about its business underperforming if JetBlue's tender  
7 offer was successful, right?

8 A. We were concerned about, um, a transaction, um,  
9 that might not have closed.

10 Q. Okay. So now if you could turn to Slide 15,  
11 which, um, is on the page ending with Bates 226, and  
12 it's titled "We believe JetBlue's real motivation is to  
13 break up the Spirit, Frontier merger."

14 Do you see that?

15 A. I'm there.

16 Q. Great. Around this time it crossed your mind that  
17 JetBlue's hostile bid could be an attempt to tank the  
18 Spirit, Frontier deal, right?

19 A. We were skeptical at that time.

20 Q. Okay.

21 A. There were a number of conditions in that tender  
22 offer that, um, that led us to be, um, um, concerned  
23 about the sincerity of their effort. The one that pops  
24 to mind most readily is the tender offer had -- if the  
25 market moved up or down 10 percent, then they didn't

1 have to proceed. And, um -- and ironically within, I  
2 think, a week or 10 days of that tender offer being  
3 issued, the market actually did move far enough that  
4 they wouldn't have had an obligation to continue.

5 Q. Okay, thank you. Now if you could turn to, um,  
6 the next slide, Slide 16, ending in 227.

7 A. (Turns.)

8 Q. You were aware that JetBlue had included a risk  
9 factor in its 10K stating that "a combined Spirit  
10 Frontier is expected to be a larger competitor to  
11 JetBlue, which may affect JetBlue's competitiveness,"  
12 right?

13 A. Um, I became aware when I saw this, yes.

14 Q. Okay. And now please take a look at Slide 20,  
15 which is ending in Bates number 233.

16 A. (Turns.)

17 Q. And 234. Those two slides are called "JetBlue  
18 continues to spread misinformation." Do you see that?

19 A. Yes.

20 Q. And so at the time it was your view that JetBlue  
21 was spreading misinformation, right?

22 A. Um, it felt like it. And there were elements of  
23 it that, um, presumed things that they couldn't possibly  
24 have known. And, um -- I don't think this part was in  
25 it, but there was some -- it was hostile. It got kind

1 of personal.

2 So, um, there were other things in here that were  
3 definitely misinformation, because it was about me. So,  
4 yes.

5 Q. Well thank you, Mr. Gardner.

6 MS. MARKEL: So you can put that exhibit aside.  
7 And at this point I would like my colleague to pass up  
8 what has been marred as SX.

9 (Passes to witness.)

10 Q. So in connection with the May 23rd, 2022  
11 presentation that we were just looking at, Spirit held a  
12 special call for its investors, right?

13 A. That's what this says.

14 Q. Okay. You don't have any reason to doubt that  
15 this is a fair and accurate copy of the transcript for  
16 that investor call, right?

17 A. I don't have a reason to know.

18 MS. MARKEL: Okay, at this time I move to admit  
19 this into evidence.

20 MR. COHEN: Your Honor, I don't object with  
21 respect to the other earnings releases other than  
22 insofar as this document contains information that are  
23 statements of analysts in the questions and answers. If  
24 it's being offered only for the statements by Spirit  
25 management, I have no objection. Otherwise it is

1 hearsay.

2 MS. MARKEL: We are fine with that limitation,  
3 your Honor.

4 MR. COHEN: And I'm also going to lodge a  
5 continuing now -- not continuing, but an objection for  
6 foundation. I mean we're just reading documents, your  
7 Honor.

8 THE COURT: I'm watching. I know what they're  
9 doing.

10 MR. COHEN: I've been trying to give counsel some  
11 leeway, but if it doesn't say it, it's not particularly  
12 probative, so.

13 THE COURT: That's what you can argue.

14 I have no objection to the admission, so it's  
15 admitted as Exhibit 681 in evidence and as limited.

16 You may proceed.

17 MS. MARKEL: All right.

18 (Exhibit 681, marked.)

19 Q. You can actually put that aside, Mr. Gardner.

20 And so let's fast-forward in time to the end of  
21 June 2022.

22 In the end of June of 2022, Spirit amended its  
23 merger agreement with Frontier, right?

24 A. At the end of '22? Oh, with Frontier? Yes.

25 Sorry. I thought you said JetBlue.

1 Q. Okay. And so if you can, um -- after Spirit  
2 amended its merger agreement with Frontier -- after it  
3 amended its merger agreement with Frontier, JetBlue made  
4 a new offer, right?

5 A. I don't know which one -- there were 2 or 3 of  
6 those back and forth over the course of June. And if  
7 you give me a date, I can tell you which --

8 Q. Well why don't you turn to Exhibit 94 in your  
9 binder.

10 A. (Turns.) I'm there.

11 Q. Okay. And this is a press release that Spirit put  
12 out after amending its merger agreement with Frontier,  
13 right?

14 A. Yes.

15 Q. Okay. So then after this, after this -- after  
16 June 24, 2022, JetBlue made a new offer, right?

17 A. Um, I believe that's right.

18 Q. Okay. Please take a look at the document that has  
19 been marked for identification as BJR in your binder.

20 A. (Turns.) I'm there.

21 Q. Okay. You recognize these to be Spirit board  
22 minutes from June 28th, 2022, right?

23 A. I do.

24 MS. MARKEL: Your Honor, I move to admit the  
25 document identified as BJR in evidence.



1 MR. COHEN: No objection, your Honor.

2 THE COURT: Received as Exhibit 681 in evidence.

3 THE CLERK: 682.

4 THE COURT: 682. I'm sorry.

5 (Exhibit 682, marked.)

6 Q. So if you take a look at the second-to-last  
7 paragraph on the page ending in 335, um, it states, "The  
8 board generally agreed that the new JetBlue proposal was  
9 not a material improvement from the June 20th proposal."

10 Do you see that?

11 A. I do.

12 Q. So the board did not recommend accepting JetBlue's  
13 June 27th, 2022 offer, right?

14 A. At that time, yes.

15 Q. Okay.

16 MS. MARKEL: You put that exhibit aside.

17 Q. So at this point please turn to the exhibit that  
18 has been preadmitted and marked as Exhibit 93 in your  
19 binder.

20 A. (Turns.) Got you.

21 Q. Okay, thank you. This is a June 28th, 2022 press  
22 release by Spirit, right?

23 A. That's what it says.

24 Q. And it's titled "Spirit Airlines reaffirms  
25 commitment to merger with Frontier," right?

1 A. Yes.

2 Q. And this was issued after JetBlue provided a  
3 revised proposal at the end of June, right?

4 A. Um, I believe so.

5 Q. Okay.

6 A. What's the date on this? I can't see it. Oh,  
7 June 28th. Okay.

8 Q. June 28th, 2022?

9 A. Yeah.

10 Q. Okay. So turn to the second page of this ending  
11 in 999.

12 A. (Turns.)

13 Q. And please direct your attention to the third  
14 bullet point in the middle of the page which states  
15 "JetBlue has already stated it would raise fares and  
16 would reduce capacity, exactly what the antitrust laws  
17 were designed to prevent."

18 A. Where are you?

19 Q. The third bullet point in the middle of the page.

20 A. Okay, I'm with you.

21 Q. Okay.

22 So as of June 28th, 2022, it was still your  
23 position that a JetBlue, Spirit deal would raise fares  
24 and reduce capacity, right?

25 A. Um, yes, that was, um, the concern we had.

1 Q. And that was based in part on JetBlue's own  
2 statements, right?

3 A. Yes.

4 Q. Okay, thank you.

5 MS. MARKEL: You can put that exhibit aside.

6 Q. Now please turn to the document marked ABY in your  
7 binder.

8 A. (Turns.) I'm there.

9 Q. This is an e-mail that you received from  
10 Mr. Christie on June 29th, 2022, right?

11 A. Yes.

12 Q. And this is from the day after Spirit published  
13 the press release that we were just looking at, right?

14 A. Correct.

15 Q. Okay.

16 MS. MARKEL: At this time I move to admit what has  
17 been marked as ABY.

18 MR. COHEN: No objection, your Honor.

19 THE COURT: ABY is admitted, Exhibit 683.

20 (Exhibit 683, marked.)

21 Q. In this e-mail Mr. Christie wrote to you that "The  
22 vote is moving quickly against us." Do you see that?

23 A. I do.

24 MR. COHEN: Objection, your Honor.

25 THE COURT: Well he wrote what he wrote.

1           And I can't read.

2           Q.       Well, Mr. Gardner, at the time of this e-mail you  
3       believed that Spirit's shareholders were unlikely to  
4       vote in favor of a Spirit, Frontier transaction, right?

5           A.       Yes.

6           Q.       Okay.

7           MS. MARKEL: And you can put that exhibit aside.

8           Q.       And now please turn to Exhibit 223 in your binder.

9           A.       (Turns.)

10          Q.       And so I could direct your attention to the last  
11       paragraph on this first page, "As of July 12th, 2022,  
12       Spirit's board was still unanimously in favor of a  
13       Spirit, Frontier transaction." Right?

14          A.       Yes.

15          Q.       Okay.

16          MS. MARKEL: You can put that exhibit aside.

17          Q.       On July 27th, 2022, Spirit and Frontier ended  
18       their merger agreement, right?

19          A.       I think that's right.

20          Q.       And on July 28th, JetBlue and Spirit entered into  
21       a merger agreement, right?

22          A.       July 28th, yes.

23          Q.       Okay, let's turn to the document marked AGE in  
24       your binder.

25          A.       (Turns.) Got you.

1 Q. Mr. Gardner, looking at AGE, this is an e-mail  
2 exchange between you and a friend of yours from July  
3 28th, 2022 after the merger agreement was announced,  
4 right?

5 A. Yes.

6 Q. Okay.

7 MS. MARKEL: And at this time I move to admit, um,  
8 the document marked AGE in evidence.

9 MR. COHEN: Hearsay, your Honor.

10 (Pause.)

11 THE COURT: What do you say to that?

12 MS. MARKEL: I am only using the statements from  
13 the nonparty for the effect on the listener, but  
14 Mr. Gardner responds, and I'm moving that for the truth  
15 of the matter.

16 THE COURT: He responds and says what, so I can  
17 see it?

18 MS. MARKEL: He responds at the very top and he  
19 says "Immediate conclusion, unfortunately regulatory  
20 approval is the big wild card."

21 THE COURT: I'll admit so much of AGE as says  
22 that. It's admitted in part. And it will be Exhibit  
23 684.

24 (Exhibit 684, marked.)

25 MS. MARKEL: And, your Honor, actually I

1 apologize, there's one other line from Mr. Gardner  
2 further down on the page where he writes "Sort of..."

3 THE COURT: I'll stand on my ruling.

4 MS. MARKEL: Okay.

5 Q. So, Mr. Gardner, at this time on July 28th, 2022,  
6 you were still of the belief that regulatory approval of  
7 a JetBlue Spirit deal was a big wild card, right?

8 A. Well this is an e-mail -- I guess it was an e-mail  
9 to a friend of mine. Most people, I can't even tell you  
10 how many people, think that when you sign a merger  
11 agreement, that that's it, like you're done. And, um,  
12 so my friends were calling to congratulate me when, at  
13 the moment I thought, "Okay, this is a good first step,  
14 but there's obviously the next part to go." So  
15 that's -- most people are relatively uninitiated about  
16 this stuff.

17 So that's why I said, um, she's like  
18 "Congratulations." I think the reason she sent it is  
19 because JetBlue sent out a blast e-mail to their  
20 frequent-flier customers announcing this, and so she's  
21 like "Oh, awesome, great," and I'm like "Sort of."  
22 (Laughs.) "We started down the road." That's what I  
23 meant by that.

24 Q. Thank you.

25 MS. MARKEL: You can put that exhibit aside.

1 Q. Now let's fast-forward a few months to October  
2 2022. So let's turn to the document marked AFR in your  
3 binder.

4 A. "A" and "F" as in "Frank"?

5 Q. "A," "F," as in "Frank," "R."

6 A. Got you.

7 Q. And you may also look at the front, at the first  
8 page behind that tab, which is a demonstrative labeled  
9 Gardner Demonstrative A, which shows the text-message  
10 exchange that followed.

11 Mr. Gardner, looking at AFR, this is a text  
12 exchange between you and Mr. Christie from October 13th,  
13 2022, right?

14 A. It is.

15 Q. And Gardner Demonstrative A is a fair and accurate  
16 representation of that text-message exchange between you  
17 and Mr. Christie on that date, right?

18 A. Yes.

19 MS. MARKEL: At this time I move to admit AFR and  
20 request to publish Gardner Demonstrative A.

21 MR. COHEN: No objection with the understanding  
22 that the demonstrative is not being offered as evidence.

23 THE COURT: The demonstrative is not evidence.  
24 But when I look at my AFR, all I -- wait a minute. Oh,  
25 I understand.

1           AFR is admitted as Exhibit 685, Demonstrative A  
2       may be published.

3           (Exhibit 685, marked.)

4       Q.     So, Mr. Gardner, on the morning of October 13th,  
5       2022, you wrote to Mr. Christie, "For this call I'm  
6       going to stick to the shareholders. We're pretty clear  
7       in their desire for this transaction rather than the  
8       other one."

9           Do you see that?

10      A.     Yes.

11      Q.     And you wrote this a few days before Spirit's  
12      shareholders voted to approve JetBlue's merger, right?

13      A.     Um, I can't remember when the meeting was, but --  
14      um, I can't -- that's the date that I wrote it. I can't  
15      say what it was before or after.

16      Q.     That's okay. But later that evening you wrote to  
17      Mr. Christie "You know I was just thinking..., do you  
18      think JetBlue would pay us something to get out of the  
19      deal."

20           Do you see that?

21      A.     I do.

22      Q.     And you wrote that months after the merger  
23      agreement with JetBlue was signed, right?

24      A.     I did.

25           MS. MARKEL: Thank you.



1 I will pass the witness.

2 THE COURT: Any questions or do you want to  
3 reserve?

4 MR. COHEN: I'm not going to reserve, your Honor,  
5 I just need a moment to get organized and I will --

6 THE COURT: That's all right.

7 (Pause.)

8 THE COURT: While they're shuffling around, I'll  
9 ask this question.

10 The last e-mail exchange with Mr. Christie, you  
11 say that you don't -- well first you ask, um, "Do you  
12 think that, um, JetBlue will pay us to get out of the  
13 deal?" Right?

14 THE WITNESS: Yeah.

15 THE COURT: And, um, then he, Mr. Christie,  
16 responds, he doesn't think so, "Nor do I think we want  
17 that."

18 Why did you think he was advising that Spirit  
19 wouldn't want that?

20 THE WITNESS: Well there's context to this e-mail.  
21 I think -- and my memory of this was in the middle of  
22 the NEA trial.

23 THE COURT: I see.

24 THE WITNESS: And my memory is, um, it wasn't --  
25 it wasn't a joke, it was a little bit tongue and cheek,

1 obviously we signed a merger agreement, but my memory  
2 was somewhere in there that, um, in the NEA trial, um, I  
3 can't remember whether it was going well or poorly at  
4 the time or what we thought, but it was probably a  
5 thought that, um -- Mr. Christie and I have -- I mean as  
6 the Chair and the CEO, we communicate, and there has to  
7 be hundreds of text messages, so --

8 THE COURT: You just thought that might have the  
9 wrong flavor in the midst of that trial?

10 THE WITNESS: Yeah.

11 THE COURT: All right.

12 And, Mr. Cohen, are you ready?

13 MR. COHEN: Yes, we're just going to bring the  
14 binders up to the witness.

15 THE COURT: That's fine.

16 THE WITNESS: Am I going to need this one?

17 MR. COHEN: Keep that one handy though.

18

19 CROSS-EXAMINATION BY MR. COHEN:

20 Q. While you're waiting for the binders, so we don't  
21 waste any time, you were asked some questions by  
22 Ms. Markel about the fear of disruption of a JetBlue  
23 merger during the period between signing and closing.  
24 Do you recall that?

25 A. I do.

1 Q. From your perspective as the Chair of the board,  
2 has the JetBlue merger disrupted the operations of  
3 Spirit?

4 A. No.

5 Q. We're going to talk a little bit about some of the  
6 financial results that Ms. Markel reviewed with you from  
7 2023.

8 In your view, is any part of the financial  
9 performance of Spirit since 2022 attributable to the  
10 pendency of the merger?

11 A. Not at all.

12 Q. Okay, let's, um -- I just want to talk a little  
13 bit more about the Spirit board.

14 You were asked some questions yesterday about your  
15 NEA experience. Do you remember that?

16 A. I do.

17 Q. And I want to talk about -- you're one of 8  
18 members of the board?

19 A. I am.

20 Q. And Mr. Christie is another?

21 A. He is.

22 Q. Okay. And so let's put up, if we can, Gardner  
23 Demonstrative 1, which has been previously shared with  
24 the government, and can you tell us what's most likely  
25 in Gardner Demonstrative 1?

1 A. Yeah, this is a brief summary of the members of  
2 the board of directors. Um, yeah, that's a little  
3 picture of me.

4 Q. Okay.

5 A. I'm in the upper left. I've been the Chair  
6 since --

7 Do you want me to go through it?

8 Q. I just want to ask you one question.

9 A. Okay.

10 Q. Did any of these members have prior experience  
11 with mergers and acquisitions other than you?

12 A. Um, yes.

13 Q. And who is that?

14 A. Let me see. Working my way down. Mark Dunkerley.  
15 Bob Johnson. Barkley Jones. Christine Richards for  
16 sure, probably the most of anyone. And Dawn Zire. And  
17 I don't know about Merna. But the others in their  
18 regular jobs.

19 Q. Okay. And why don't you tell us a little bit --  
20 rather than just reading the title, tell us a little bit  
21 about what each of these members of the board contribute  
22 to the collective experience and judgment of the Spirit  
23 board?

24 A. Okay. So when we assemble the board we look for  
25 people who have relevant experience in areas that we

1 think are going to, um, add particular value to the  
2 deliberations and decisions that the board makes related  
3 to the company. So -- and Ted obviously is our CEO.  
4 He's the only, um, um, interested director, the rest are  
5 independent.

6 Mark Dunkerley has, um, at least two decades,  
7 probably more like three, um, decades directly in the  
8 commercial aviation business. His last job was the CEO  
9 of Hawaiian Airlines. And he currently is the board  
10 member on a few airlines. And he's also on the board of  
11 Airbus.

12 Bob Johnson, um, it's also an old picture, was  
13 the -- his last full-time gig was as the CEO of  
14 Honeywell Aerospace. He's currently the Chairman of the  
15 Board of a company called Spirit Aerosystems, which is  
16 no relation to Spirit, but it's one of the largest  
17 airframe manufacturers in the country. They make the  
18 fuselages for Boeing and for Airbus.

19 And Barkley Jones has been in and around the real  
20 estate M & A and finance businesses his whole career.  
21 He's actually the longest-tenured director, he's been on  
22 the board since I believe 2006.

23 Christine Richards came on the board I think four  
24 years ago. She's the, um, head -- retired as the  
25 General Counsel, um, of FedEx, and was there for, um,

1 more than 20 years. And probably has more M & A  
2 experience than everyone else on the board combined.

3 Merna Soto was the Chief Information and Security  
4 Officer for Comcast cable company for a number of years.

5 And then Dawn Zire was the former CEO and Director  
6 of NutriSystem. And her -- so that the last two, um,  
7 since we're in the consumer-facing business, Dawn had a  
8 ton of experience in marketing and consumer behavior.  
9 And cyber security's been a major focus of every  
10 business, but in particular ours since, um, since the  
11 world went to their phones, and Merna's got a deep  
12 background in cyber security.

13 Q. And did each of these Spirit board members  
14 participate in the evaluation of the Frontier and  
15 JetBlue transactions?

16 A. Um, yes, all of them participated and all of them  
17 voted, and all votes around all transactions. Whether  
18 we're voting for something or against something, all  
19 votes were unanimous.

20 Q. How many meetings do you think the board of Spirit  
21 had in 2022 to discuss these transactions?

22 A. Something just shy of 30 maybe.

23 Q. And you were asked some questions at the outset of  
24 your examination yesterday about whether you viewed it  
25 your responsibility as the Chair of the board or as a

1 director to follow the preferences of shareholders. Do  
2 you remember that?

3 A. I do remember that.

4 Q. Okay. Is that how you understand what your role  
5 is supposed to be as a director of a public company?

6 A. Up, no, not at all.

7 Q. Okay, what is your understanding?

8 A. So, um, I guess simply put, I view, um, the role  
9 of the board in a fiduciary matter, I sort of compare --  
10 I was thinking about it last night because I couldn't  
11 understand what "preferences" was, um, and it's the  
12 difference between being a babysitter and being a  
13 parent.

14 There's things that kids want, the babysitter is  
15 inclined to give it to them because they want it, but a  
16 parent knows better, and the parent is acting in the  
17 child's best interest. So our view -- my view as being  
18 a director is I represent all the shareholders, but I'm  
19 supposed to do what I think is right in my judgment for  
20 all shareholders. I happen to be one as well.

21 And I think -- I don't think that, um -- we  
22 regularly, um, I don't know if it's annual, but  
23 regularly we, you know, have our own onboarding process,  
24 and periodically we bring in counsel to advise us what  
25 the role of a -- you know what a member of the board is

1 doing and what their duties are as directors. So I  
2 don't think that's lost on anyone.

3 THE COURT: So your view is much like a  
4 legislator, at least in theory?

5 THE WITNESS: Um, I -- yeah, I guess so.

6 THE COURT: Go ahead, Mr. Cohen.

7 Q. Mr. Gardner, I want to pivot to another topic you  
8 were asked about yesterday and a little bit today, which  
9 is Spirit's financial position.

10 Has Spirit been profitable over the course of your  
11 time as a member and then as the Chairman of the Spirit  
12 board?

13 A. Um, my memory, I think from 2010 until 2019, I  
14 think we -- I think we were profitable every year.  
15 There were certainly quarters where we weren't, but I  
16 think every year we had a profit.

17 Q. Go ahead. I'm sorry.

18 A. Since 20 -- since covid, the beginning of covid,  
19 in whatever, February or March of 2020, um -- in 2020,  
20 '21, and '22, our cumulative losses are approaching a  
21 billion and a half dollars, in and around 4 to \$500  
22 million losses per year. So -- and I don't know what  
23 the aggregate adds up to. I don't know. We still have  
24 a positive net worth, but the last three years -- and  
25 this will be 4, because we are going to have a loss this



1 year, and that number is probably in the same kind of  
2 range, 4 to 500 million. So since covid we will have  
3 lost about, um, at the end of this year, just shy of \$2  
4 billion.

5 Q. So does Spirit sustain its business model losing  
6 \$500 million a year?

7 A. Um, if we continue losing \$500 million a year?  
8 Absolutely not.

9 Q. I want to turn to what the board anticipated for  
10 2023, and I believe you testified yesterday that the  
11 board set the budget at the December meeting of 2022.  
12 Do you remember that?

13 A. Yeah.

14 Q. And does the board review budgets annually, in  
15 December?

16 A. We do.

17 Q. And what did the 2023 budget that was approved  
18 last December forecast with respect to profitability?

19 A. I believe the budget said we'd make a couple-  
20 hundred million dollars for 2023.

21 Q. And what was the reason why Spirit believed, in  
22 the December of 2022, that 2023 would be the first  
23 profitable year since before covid?

24 A. Um, so in -- our business is seasonal. So in the  
25 first quarter and -- and we're a calendar year, fiscal

1 year, so, um, the first quarter is the winter, January  
2 through March, we, um, typically lose money that  
3 quarter, it's the slowest time of year.

4 The second quarter is usually profitable. But the  
5 third quarter, I refer to it as that's our "Christmas in  
6 retail," the third quarter is the quarter when we make  
7 the bulk of our money. And then we typically turn a  
8 profit in the fourth quarter as well.

9 Since covid, so all of 2020 was shot for all the  
10 covid reasons everyone knows about. 2021 started off,  
11 um, in early April, um, people started to fly again and  
12 things looked really good and then Omnicron -- I don't  
13 know how many versions that was, but Omnicron hit, and  
14 all the hope that -- I think most of the airlines had  
15 it, for everything returning to normal, um, was thrown  
16 out the window. So 2021 turned into people stopped  
17 flying again.

18 What 2022 was, even though we had a loss, was that  
19 the booking patterns and travel patterns started to look  
20 like they had before. And our fourth quarter of, um,  
21 2022, um, started to -- both the booking trends and, um,  
22 and ticket prices started to look like it was returning  
23 to the more normal pattern.

24 And so we -- and, um, looking into January, the  
25 first quarter, had started to look, um, people buying

1 tickets in advance and at rates that looked like it was  
2 more normal than it had in the last few years.

3 Q. And let's look at the actual performance in the  
4 first quarter.

5 Would you look at behind Tab 11 in your book is  
6 Exhibit 77 in evidence, which is an 8K, and then a  
7 Spirit Earnings Release for the first quarter.

8 THE COURT: What tab do you want him to look at?

9 MR. COHEN: Tab 11, your Honor. 77.

10 THE COURT: Thank you.

11 Q. And specifically, Mr. Gardner, I'm going to direct  
12 your attention to the fourth page of the exhibit that  
13 has the Bates numbers 4629. Let me know when you're  
14 there.

15 A. (Turns.) I'm there.

16 Q. And what this shows is that, um, Spirit had a loss  
17 in the first quarter of 2023, correct?

18 A. Yes.

19 Q. And I should have done this before, but this  
20 document, this Earnings Release, if you go back to the  
21 first page, this is as of April 26th, 2023. Do you see  
22 that?

23 A. Yes, I do.

24 Q. Okay. And was that unexpected, the first quarter  
25 loss?

1 A. No.

2 Q. And the first -- underneath some of the numbers on  
3 the first page, it says "For the first quarter of 2023,  
4 our adjusted operating margin came in better than  
5 expected, helped by lower fuel and a strong revenue per  
6 available seat mile TRASM performance. Looking ahead to  
7 the second quarter, demand continues to be strong and  
8 industry capacity remains constrained, both of which are  
9 beneficial for unit rep."

10 Do you see that, sir?

11 A. I do.

12 Q. And did Spirit have any reason, at the end of the  
13 first quarter or in April of 2023, to believe that it  
14 would not meet its goal of having a profitable 2023?

15 A. No.

16 Q. And if you would turn to Page 4630, the next page,  
17 I'm interested in the paragraph, I'm going to direct  
18 your attention to the paragraph about "Fleet" that says  
19 "For the second quarter of 2023." Do you see that, sir?

20 A. I do.

21 Q. And it says "For the second quarter of 2023, we  
22 estimate our operating margin will range between 4.5 and  
23 6.5 percent." And then if we go down a few lines to the  
24 next-to-last sentence in this paragraph it says "We  
25 expect to be profitable for the remainder of the year

1 with margins improving each quarter."

2 Do you see that, sir?

3 A. I do.

4 Q. Was this Earnings Release the last Earnings  
5 Release the company had issued at the time of your  
6 deposition?

7 A. Um --

8 Q. Which was the end of June.

9 A. Well, yeah, the second quarter wasn't over --  
10 Earning Releases for sure. I don't know if we had any  
11 other releases. But, yes.

12 Q. And if we also look on this -- at page --

13 MR. COHEN: I'm sorry. You can put this document  
14 aside.

15 Q. Let me ask you to turn to the next tab, Tab 12.  
16 And this is the Q2 Earnings Release dated August 3. Do  
17 you see that?

18 A. I do.

19 Q. So does that refresh your recollection now that,  
20 at the time of your deposition, the only earnings that  
21 had been released was for Q1?

22 A. Yes.

23 Q. Okay. And this is Exhibit 76. And I'm going to  
24 ask you again to turn to the third page, which is Bates  
25 14611.

1 A. (Turns.)

2 Q. Do you see the reported net income loss of \$2.3  
3 million?

4 A. Yes.

5 Q. And how did that compare to the forecast that the  
6 Spirit board had issued prior to Q2?

7 A. The prior forecast -- well the Q1 forecast said 4  
8 1/2 to 6, and we came in at, um, 3.4. And I'm focused  
9 on the operating margin.

10 Q. Okay, why are you focused on the operating margin?

11 A. Well, um, we lost 2.3 million versus, um, on an  
12 adjusted basis we had a profit of 32.3.

13 Q. Okay. And if you'd turn to the next page, 14612,  
14 the paragraph that begins "Despite achieving record  
15 revenue."

16 Do you see that, sir?

17 A. I do.

18 Q. "Despite achieving record revenue, quarterly  
19 revenue in the second quarter of 2023, productivity had  
20 wins primarily related to pilot constraints, and NEO  
21 engine availability issues resulted in a disappointing  
22 operating margin. With these issues, as well as an  
23 acute reduction in the domestic and Latin American  
24 demand outcome, we estimate our third quarter operating  
25 margin will range between 5.5 percent and negative 7.5

1 percent."

2 Do you see that, sir?

3 A. The first says "negative," "negative 5.5 and  
4 negative 7.5."

5 Q. I thank you, "negative 5.5 and negative 7.5."

6 A. Correct.

7 Q. And what had been the prior forecast?

8 A. Um, well it didn't say specifically, but it said  
9 the margins were going to improve from 4 1/2 to 6, so.

10 Q. Positive 4 1/2 to --

11 A. From positive 4 1/2 to 6. So we lost 10 points in  
12 that process.

13 Q. And not to go over ground we've already gone over,  
14 but is the "NEO engine availability" the issue that you  
15 discussed yesterday in your testimony?

16 A. Yes, it is.

17 Q. And is that issue going to be solved in 2023?

18 A. Um, no.

19 Q. Is it going to be solved, the engine issue, in  
20 2024?

21 A. Um, I don't think anyone is planning on that. Not  
22 that I've heard. So I think the answer is no. In fact  
23 we're planning on having more planes on the ground than  
24 we do now.

25 Q. And actually you testified yesterday about

1 something called "AOG." Is that "Aircraft On Ground"?

2 A. "Aircraft On Ground."

3 Q. And do you recall how many aircraft on the ground  
4 you're expecting at the end of 2024?

5 A. I think it's around 40.

6 Q. What percentage of Spirit's fleet is that?

7 A. Um, 20 percent. It's like having a hotel that you  
8 -- with rooms to rent that you can't open.

9 Q. And is the engine issue going to be resolved in  
10 2025?

11 A. Um, I don't think so. Not -- based on what I know  
12 now, I think the answer is probably not.

13 Q. Can you state with any degree of certainty when  
14 this Pratt & Whitney engine issue will stop affecting  
15 Spirit Airlines?

16 A. Um, no.

17 Q. Now in that sentence also, the next one of the  
18 sentences I read, it talks about "an acute reduction in  
19 the domestic and Latin American demand outcome."

20 Do you see that, sir?

21 A. Yes.

22 Q. Okay. And what does that refer to?

23 A. So, um, sometime in -- so the way this summer --  
24 and I just keep using the word "normal," there was a  
25 pattern of business that -- that I was used to as a



1 board member for a decade and then covid hit, and for  
2 the first, um -- for the first number of years after  
3 covid, a convention for analysts and whatever on the  
4 street, when they're looking at airline results, was  
5 they compare it to 2019, which was the last year that  
6 was, um, uninterrupted by, you know, these changes.

7 But the way that the summer looked, July and  
8 August typically were very strong, and the reason for  
9 that is we are predominantly a leisure carrier, so  
10 you've got people going on vacation, and it's the  
11 busiest time of year for travelers to vacation. And  
12 what happened on those is that sometime in July,  
13 bookings for all that -- normally bookings stay strong  
14 through Labor Day, and for some reason in 2023, um, that  
15 pattern broke in August, which would normally look  
16 strong, um, kind of fell out of bed. And "bookings," as  
17 it says here, the word "acute," um, was, um, certainly  
18 unexpected, and didn't follow any trends that we had  
19 ever seen that were, um, normal.

20 Q. You were asked a question or two by Ms. Markel  
21 about the "load factors" of Spirit, do you recall that?

22 A. Yup.

23 Q. And how do you reconcile the fact that she showed  
24 you that the load factor was in the 80-plus-percent  
25 range with the statement in this Earnings Release that

1 there's been an "acute reduction in demand"?

2 A. Well, um, not that I don't care about "load  
3 factor," but "load factor" isn't actually -- we could  
4 fill the plane at a dollar, um, it -- the issue for  
5 health and profitability is at what price are you  
6 selling seats?

7 So an acute reduction in -- and what this means is  
8 that an acute reduction, that the fares necessary to,  
9 um, have profit in that period is what you are paying  
10 attention to. In those same charts there was a number  
11 in those things that was called "yield," which is  
12 basically what's the margin you're making on the 80  
13 percent or the 81 percent load factor that you have?  
14 And in those things the yield, in each of those  
15 quarters, the yield was going down, which means we were  
16 putting the same number of passengers on the plane, they  
17 were just paying less money for their seat.

18 Q. And is that sustainable for Spirit?

19 A. That set of conditions? No.

20 Q. Would you look at Tab 13 in your binder, Exhibit  
21 337 in evidence. Do you see that, sir?

22 A. 337? Yup.

23 Q. It's an Investor Update as of September 12th,  
24 2023. Can you tell us what this is?

25 A. It's yet, um, another revision to, um, what we

1 expected to have happening in the third quarter.

2 Q. And what was that revision?

3 A. Um, another 10 points down. So, you know, we  
4 started with an expectation at the end of April of 5  
5 positive, August 3rd it was 5 negative, September 12 was  
6 15 negative. So over the span of that 4-month period,  
7 um, our margin expectation declined 24 points.

8 Q. And do you have an understanding as to why, um,  
9 this guidance was required and why Spirit is doing -- as  
10 it was stated in September, that it is expected to do  
11 even worse than what it had announced in August?

12 A. Um, this is very unusual, um, in that the entire  
13 time I've been on the board, I think this is the first  
14 time we did it. And we, um -- guidance is given to, um,  
15 to the street to -- you want to tell them what you think  
16 is going to happen and a lot of times you're not really  
17 sure, right, because there's business ahead of you. But  
18 once you know what something is going to be, and it's  
19 going to be materially different, we felt an obligation  
20 to convey that to the street.

21 Q. And let's look at the actual results for Q3. And  
22 that's -- I want to look at the Earnings Release that's  
23 behind Tab 15, which was marked by the government  
24 yesterday as Exhibit 678 in evidence. Let me know when  
25 you're there. It should be Tab --

1 A. I'm there.

2 Q. Tab 15 in your book.

3 A. Yes. Okay.

4 Q. And this shows me -- and this was dated October  
5 26th, 2023.

6 Do you recall discussing this document with  
7 Ms. Markel?

8 A. I do.

9 Q. And let's just start with the bottom line. What  
10 was the net income loss for the quarter?

11 A. 157.6 million.

12 Q. Okay. And what was the margin, the operating  
13 margin?

14 A. Minus 15 percent.

15 Q. Now putting covid, 2020 to one side. In the time  
16 you have been on the board at Spirit, has Spirit ever  
17 had a third quarter with a 15 percent negative operating  
18 margin?

19 A. No.

20 Q. What's the -- and look below the numbers, it says  
21 "Softer demand for our product and discounted fares in  
22 our markets led to a disappointing outcome for the third  
23 quarter of 2023."

24 Do you see that, sir?

25 A. (Looks.)

1 Q. The first quote under the --

2 A. I do.

3 Q. And has that been discussed with the board?

4 A. It has.

5 Q. And then it goes on to say, two sentences later,  
6 "And unfortunately we have not seen the anticipated  
7 return to normal demand and pricing environment for the  
8 peak holiday periods."

9 And has that changed since the end of October?

10 A. I don't believe so.

11 Q. And then it says, "Given these continued trends,  
12 we," meaning Spirit, "are evaluating our growth profile  
13 and our competitive position."

14 What does that mean?

15 A. Um, that means that, um, that we can't just keep  
16 doing what we're doing and expect, um, the outcome to be  
17 dramatically different. If this environment stays the  
18 way it is, um, I guess the expression I'd use is "hope  
19 is not a strategy." So, um, we're going to do what we  
20 need to do to figure out, um, how to address this.

21 Q. And if you'd turn to the next page of Exhibit 678,  
22 Page 2, if you look at the second paragraph on there, it  
23 says "On a per-passenger-flight-segment basis, compared  
24 to the same period of 2022, total revenue per passenger  
25 flight segment for the third quarter of 2023 decreased

1 13.5 percent to \$116.43."

2 What's the significance of the "revenue per  
3 passenger" number to your business -- to Spirit's  
4 business?

5 A. Um, well that's what you're getting for, um, per  
6 seat on the plane, and against the, um -- well you've  
7 obviously got all the costs against that. So, um, in a  
8 healthy business you've got your, um, revenue per seat  
9 going up, and ideally it's above the cost of delivering  
10 that, you know, seat cost. So a 13 1/2 percent decrease  
11 is meaningful.

12 Q. And how about, in the following sentence, the  
13 decrease in fare revenue of 27.8 percent. What is "fare  
14 revenue"?

15 A. So we -- in our unbundled product we sell the  
16 ticket and then we sell what are called "ancillaries."  
17 So if you've got a bag, you pay extra for the bag, and  
18 it depends whether the bag goes in the belly of the  
19 plane or if you want to carry it on with you. You'd  
20 also pay for, um, WIFI, you'd pay for seat assignment,  
21 you'd pay for, um, getting on early, um, you know all of  
22 the sort of a la carte things that you might want are  
23 what are considered "ancillaries." And that's, um,  
24 generally speaking that's been, you know, 50 percent or  
25 more of our total revenue per passenger.

1 Q. And you were asked some questions about, um, by  
2 Ms. Markel, about answers you gave in your deposition on  
3 June 27th.

4 Do you recall that?

5 A. Yes.

6 Q. And she asked you in June about whether Spirit had  
7 a plan to be profitable, to grow increased revenue, a  
8 healthy standalone plan as a travel company. Do you  
9 recall those questions and answers?

10 A. I do.

11 Q. And are those truthful answers that you gave in  
12 June?

13 A. Yeah, of course.

14 Q. And do you today believe that Spirit has an  
15 achievable standalone plan for profitability and growth?

16 A. Um, not if we just keep doing what we're doing.

17 Q. All right. Has management given the board the  
18 solution to the problems that have arisen over the  
19 course of 2023?

20 A. Um, they have not given us the solution, no. But  
21 we are, um -- as I would say there's a lot of wood to  
22 chop and they're busy chopping. But as of now, no.

23 Q. And in your view, as the Chair of Spirit's board,  
24 what impact did the pendency of a merger with JetBlue  
25 have on these results?

1 A. Nothing.

2 Q. Did management take its eye off the ball of  
3 running a standalone airline?

4 A. No.

5 Q. And what protections, if any, did the board put in  
6 place in the merger agreement with JetBlue to ensure  
7 that management would stay focused on running standalone  
8 Spirit?

9 A. Um, well there were -- there were two primary  
10 ones, um, and, um, the specific one was what we call  
11 "interim operating covenants." So we wanted to be sure  
12 because we knew it would take a while, we wanted to be  
13 sure that, um, Spirit could run as an independent  
14 airline without having to, um, worry about its, um --  
15 the easiest example is we compete against JetBlue just  
16 like we would have competed with them before, for fares  
17 and for customers. And so we've been running the  
18 airline as if it was going to remain independent.

19 The other piece that was important, um, was  
20 frequently in a merger when a deal gets signed, you run  
21 the risk of losing -- because of an acquisition, you run  
22 the risk of losing senior people. We negotiated a  
23 retention package, not just for our senior executives,  
24 but it actually went fairly deep into the organization,  
25 certainly all of the critical people, and that's got to



1 be probably at least 100, maybe more, and to make sure  
2 that they had every incentive to stick, um, with the  
3 management team through the pendency of the conclusion.  
4 And I'm happy to say, um, and I think it's probably as  
5 much related to Ted's leadership as anything else, that  
6 we have not lost any senior executives since the  
7 announcement of this merger in July of '22. So those  
8 were the, you know, the two primary things.

9 Q. What restrictions if any do those interim  
10 operating covenants -- and I know you're not a lawyer,  
11 but to your understanding, what restrictions if any do  
12 those interim operating covenants put on the ability of  
13 Spirit to run a standalone airline?

14 A. Um, we had baskets for borrowing, we had --  
15 nothing that would have gotten in the way, we couldn't  
16 like issue equity, um, and add to the share count, um,  
17 except in I think some very limited circumstance. But  
18 for the most part we structured it so it would be  
19 business as usual.

20 Q. And are you aware of any requests of JetBlue under  
21 those covenants that were turned down by JetBlue?

22 A. No.

23 Q. Now I want to turn, um, next to the JetBlue  
24 negotiations that Ms. Markel covered with you today.  
25 And let me ask you to turn to Tab 2 in your binder, and

1 this is Exhibit Number 295 in evidence, the April 21st,  
2 2022 board minutes, and I'm going to ask you to turn to  
3 the second page that ends in 3374.

4 Do you see that?

5 A. No, I started turning my book and you're way ahead  
6 of me. What Tab are we on?

7 Q. Tab 2.

8 A. Okay.

9 Q. It's two pages. And if you look at the -- do you  
10 see it?

11 A. I'm there.

12 Q. Okay. It's the first page of the minutes of the  
13 board meeting?

14 A. Yes.

15 Q. And was this a few weeks after the first JetBlue  
16 offer?

17 A. It was.

18 Q. And turn to the second page, 374, the next-to-last  
19 paragraph.

20 A. Yeah.

21 Q. "Mr. Christie suggested that the company revert to  
22 JetBlue without turning down the proposal, but setting  
23 forth some guiding principles, namely flexibility and  
24 regulatory remedies, retention and significant  
25 shareholder protection provisions, i.e. reverse

1        termination fee." Let me just stop you there.

2                Why didn't the board, as soon as this JetBlue  
3        offer came in, turn the offer down?

4        A.        Um, because, um, we knew, um, what -- we had a  
5        deal in hand but we knew that JetBlue was a, um, a very  
6        capable company with the means to make an offer that  
7        we'd find acceptable. In fact over the course of, I  
8        don't know, at least since 2018, we do strategic reviews  
9        of where do we fit in the landscape? And most of those  
10       reviews, the three primary airlines that have been on  
11       those charts as viable candidates that would have  
12       strategic value for us to potentially combine with was  
13       Frontier, JetBlue, and Allegiant.

14                So, um, we knew the fact that they made an offer,  
15       one, it was an opening letter, so who knows what the  
16       answer would have -- you know where they would go, how  
17       serious they were. But when you have an offer and  
18       you're a board member and a fiduciary and you have a  
19       strategic, um, competitor who makes an offer, you have  
20       an obligation to run it to ground to see whether or not  
21       it's something that -- and the conditions actually, our  
22       Frontier agreement, the merger agreement, um, had a  
23       provision that allowed us to, um, negotiate with another  
24       party under certain conditions, because that was our  
25       obligation as a board. And those two conditions were

1     that the offer was superior from a financial point of  
2     view and reasonably likely to be able to be consummated.

3             So we thought that their first offer, um, met  
4     neither of those tests, but again it was their opening  
5     letter. So that, um -- this paragraph is -- the items  
6     you mentioned, "regulatory remedies," "retention," those  
7     were the items that would be of concern to us about  
8     getting to an answer.

9     Q.     And did the board believe, on April 21st, 2022,  
10    that JetBlue could ultimately enter into an agreement  
11    with Spirit that would be reasonably likely of being  
12    consummated?

13    A.     We thought it was possible, but not that offer.

14    Q.     And when you decided to negotiate with JetBlue,  
15    were you aware that JetBlue's fares on average were  
16    higher than Spirit's fares?

17    A.     Yes.

18    Q.     Why then did you continue to negotiate?

19    A.     Um, because, um, that wasn't the, um, that wasn't  
20    the test for whether or not this was a transaction that  
21    would make sense. We've always, um, looked at and  
22    thought that scale and size was important. Most of the  
23    reason -- when we would do these strategic reviews --  
24    and the last one in the course of this case, the first  
25    one that sort of shows up is 2018, but I'm pretty sure

1 we were doing it before that.

2 My view is I'd rather know what's going on in the  
3 landscape with our competitors because I'm a bigger fan  
4 of making things happen than having them happen to me.  
5 So we regularly would review, um, not just what should  
6 we do, but what would it be like if, um, if JetBlue  
7 merged with Frontier, what situation would we be in?

8 So, um, so we, um, we regularly, um, looked at  
9 those things. And the marketplace is big. And over --  
10 I think from 2014 was probably our peak margin year, and  
11 that was also -- I think it was Delta, was the first  
12 competitor to introduce Basic Economy. And Basic  
13 Economy in the majors is basically our product offered  
14 at, on top of, or slightly more than our fare, but it  
15 unbundles the product.

16 So competition, um, was available at a --  
17 JetBlue's average fare was higher, but if you wanted  
18 to get -- I can't remember what the -- they've got a,  
19 what do you call it, a bare-bones, um, product that  
20 costs the same as ours probably, it's just that their  
21 average, right, when somebody buys a little more extra  
22 leg room, um, their average is higher because their  
23 consumers want more. But certainly on -- I've gotten on  
24 Delta, United, and American, I've gotten fares from  
25 places that we go that are the same prices as ours. Now

1 I'm sitting in the middle seat and I've got my backpack  
2 under the seat in front of me, but the fare was the  
3 same.

4 Q. Look at the last sentence of Exhibit 295.

5 A. Yeah.

6 Q. It says, "Mr. Gardner suggested the board  
7 reconvene soon to discuss a straw man response to  
8 JetBlue to be prepared by management and advisors."

9 Do you see that, sir?

10 A. I do.

11 Q. And do you recall making that statement at the  
12 board meeting?

13 A. I do.

14 Q. What did you mean by a "straw man proposal"?

15 A. So the "straw man," for each of those items, what  
16 would each of those things look like? How big a  
17 retention package would we think we needed? What kind  
18 of reverse termination fee do we think that we would  
19 need? What set of regulatory remedies do we think we  
20 would need in order to be -- to think that there was a  
21 reasonable likelihood -- a reasonable likelihood that we  
22 could enter into a transaction that would be approvable?

23 Q. And did Spirit in fact convey those principles to  
24 JetBlue with respect to regulatory remedies, retention,  
25 and shareholder protection, that it thought was required

1 to consummate a transaction?

2 A. We did.

3 Q. And did there come a time when JetBlue responded?

4 A. Um, to that initial request? Yes.

5 Q. And did the first response by JetBlue satisfy you?

6 A. No.

7 Q. And what did you do in response to that?

8 A. Um, we told -- we -- I think they sent a letter  
9 and we rejected it and reaffirmed our transaction with  
10 Frontier, and, um -- I mean we had the road map in front  
11 of them from the very beginning, we said "This is what  
12 we need." If I'm remembering right, we told them we  
13 needed an RTF, a Reverse Termination Fee of about 12 1/2  
14 percent of the transaction amount, um, and they offered  
15 200. Miraculously at the end of the transaction that we  
16 signed with them, the RTF was right about 12 1/2 percent  
17 of the transaction with them.

18 Q. Now Ms. Markel showed you various documents from  
19 May, press releases, board decks, do you recall that?

20 A. I do.

21 Q. By the way, did you prepare that board deck that  
22 you were shown from May 23rd?

23 A. Pardon me?

24 Q. Did you prepare the May 23rd board deck you were  
25 shown by Ms. Markel?

1 A. No.

2 Q. When did you get that board deck?

3 A. Um, I think it was about, looks like 8:30 in the  
4 morning of the -- the morning of the meeting itself.

5 Q. Okay. And did there come a time after those  
6 public statements by Spirit in May, um, saying --  
7 expressing concerns about JetBlue, that you resumed  
8 negotiations with JetBlue over a potential transaction?

9 A. Yeah, um, my memory is that -- is the -- from the  
10 time they sent the letter, um, we stayed in a pretty  
11 steady state of negotiation because we had a serious  
12 buyer. I think when the hostile got launched and it  
13 got, um, a little nasty, um, we -- I think we shut down  
14 the data room, it was a couple of weeks maybe -- and  
15 maybe from the middle of May until the time they went  
16 hostile until Memorial Day, something like that.

17 But, um, you know, it's a -- there's a process.  
18 We knew there was a process and we knew that "Just say  
19 no" was not, um, viable. And so our goal as a board was  
20 to see, based on the principles that we knew we needed  
21 in order to get comfortable, to continue to focus on  
22 getting to that set of principles that we had given them  
23 at the front end.

24 Q. And did those principles include regulatory  
25 commitments beyond what JetBlue initially offered?



1 A. Oh, yes, they did.

2 Q. Now would you look please at Tab 9 in your book,  
3 9, it's Exhibit 226.

4 A. (Looks.)

5 Q. It's a big document, I'm only going to show you  
6 one or two small pieces of it, and it's the schedule of  
7 14A in connection with the shareholder vote on the  
8 JetBlue transaction.

9 A. Yes.

10 Q. Now is that called a "merger proxy"?

11 A. It is.

12 Q. And could you turn please to Page 33, which has  
13 the Bates number 0789 at the bottom.

14 A. (Turns.)

15 Q. Do you see that, sir?

16 A. 33?

17 Q. 33, that section that says "Background of the  
18 merger."

19 A. Yup.

20 Q. And then if you just page through 33, 34, 35, and  
21 all the way through to Page 43 -- through Page 43, can  
22 you tell us what's set forth in those 10 pages of the  
23 merger proxy?

24 A. You know how I spent my summer vacation. Yeah, so  
25 there was a constant, um, stream of service -- this is a

1 lot of meetings, behind the meetings, um, conversations  
2 between professionals of both sides. But in effect it's  
3 the amount of "engagement," for lack of a better term,  
4 between the two sides, in getting to, um, a place where  
5 we could unanimously support this merger.

6 Q. And did there come a time when the Spirit board  
7 became comfortable with the regulatory commitment from  
8 JetBlue?

9 A. Yes.

10 Q. Why was that?

11 A. Because -- so that the initial commitment, um, was  
12 sort of read to us like it was originally at their  
13 discretion, so "We'll do this if we can." We had  
14 concerns about the NEA, um, and -- which was the  
15 Northeast Alliance, um, and we had concerns about it in  
16 large part because we didn't understand the magnitude  
17 and the scope of it because we hadn't ever seen the  
18 agreement, and they were unwilling to share it with us,  
19 I'm sure for their own good reasons. So it was hard for  
20 us to understand, um, just how far they were prepared to  
21 go.

22 Their initial offer said they would put it  
23 together, a divestiture remedy package up to the size  
24 of -- until it had a material adverse effect on Spirit  
25 as a whole. Over the course of these 15 pages, that got

1 expanded to being -- having a material adverse effect on  
2 both Spirit and JetBlue, the combined enterprise, which  
3 was at least double the size. So that got even larger.

4 And then over the course of I would say from the  
5 end of June, maybe late June through to -- through to  
6 most of July, we, um, came to have an understanding -- a  
7 better understanding of the size of what that NEA carve-  
8 out was, how big that was, and we concluded that the  
9 skin in the game that JetBlue had was significant, was  
10 substantial enough for us to believe that they were  
11 going to do whatever it is they needed to do to get to a  
12 closing on this transaction, whatever sort of remedies  
13 that they would need to offer up to the government and  
14 to the regulators in order to make that happen. Which  
15 is how, um, as I understand it -- and I'm not a lawyer,  
16 but as I understand the bulk of the mergers that have  
17 happened over the last 20 years have been solved with,  
18 um, with those type of divestiture remedies.

19 So we felt that, um, that the package that was  
20 together was, um, it insulated us from the risk of a  
21 no-deal.

22 Q. And when did the board approve the JetBlue merger?

23 A. The 28th of July.

24 Q. And was it a unanimous decision?

25 A. It was.

1 Q. When you voted for that merger, or to recommend  
2 that merger to the shareholders, an affirmative  
3 recommendation, did you believe that there was a  
4 reasonable path to regulatory approval?

5 A. Oh, for sure.

6 Q. Would you have voted for the merger if there was  
7 no reasonable path for regulatory approval?

8 A. Never.

9 Q. Can I ask you to stay on this exhibit, um, the  
10 merger proxy, 226, and just ask you to turn to Page 47,  
11 which has the dates 40803.

12 A. I'm there.

13 Q. Do you see the section in the middle that says  
14 "Reasons for the merger, recommendation of the Spirit  
15 board of directors"?

16 A. I do.

17 Q. And why is this section included in the merger  
18 proxy?

19 A. It's to give shareholders who are about to vote on  
20 whether or not to approve this, a window into what the  
21 reasoning of the board was for thinking that the -- that  
22 this was something that they should support.

23 Q. And the first bullet says that "The Spirit board  
24 of directors believed that entry into the merger  
25 agreement with JetBlue was the best available strategic

1 alternative for Spirit given the termination of the  
2 previously-proposed merger agreement between Spirit and  
3 Frontier following the failure of the Spirit  
4 stockholders to approve that agreement."

5 Do you see that, sir?

6 A. Yes.

7 Q. And did the Spirit board believe, in June of --  
8 in July of 2022, that a combination with JetBlue was  
9 preferable to a standalone Spirit?

10 A. Absolutely.

11 Q. Why?

12 A. The reason we sort of -- we're always interested  
13 in, um, doing something strategic that was, what they  
14 call "inorganic," right? We had our own organic plan,  
15 we had planes on order. But the network benefits of  
16 being a larger airline in this industry are -- are  
17 significant.

18 So, um, first you've got four competitors, each of  
19 whom control roughly 20 percent of the domestic air  
20 traffic, so the rest of us are fighting over the last  
21 fifth. We had gotten ourselves to, um, 4 percent, 5  
22 percent, but there's only so much, you know, you can do.  
23 And one of the biggest, um, to me strategic benefits,  
24 um, is I think about our network map and where we fly,  
25 and then you take someone like JetBlue or Frontier,

1 right, and where they fly, and JetBlue flies places that  
2 we don't fly and we fly places they don't. So when you  
3 put those two networks together, all of a sudden you  
4 have two city pairs that, um, a route that you can fly  
5 that neither of you could have flown before.

6 And, um, and one of the important components, and  
7 it's become more important over time, I think one of the  
8 reasons that Basic Economy was, um, has been such a, um,  
9 challenge, is that while we have a loyalty program,  
10 these other airlines have, um, a much larger loyalty  
11 program, they've got people walking around with their  
12 credit cards.

13 And so the importance that -- the more important  
14 you can be to your customer, i.e. being able to take  
15 them rather than just from New York to Florida, if you  
16 can take them anywhere they want to go, then they're  
17 going to be more dependent and more likely to use you.

18 So we've always thought as a strategic rationale,  
19 that was the reason that we wanted to get bigger than we  
20 could get on our own, and this transaction we met all of  
21 those objectives.

22 Q. Okay, and if you look at the third bullet, "The  
23 expectation that the merger will create a more  
24 competitive and financially successful airline than  
25 Spirit would be able to create on a standalone basis,

1 including because the combined company would constitute  
2 the fifth largest airline in the United States."

3 Did you believe that at the time you voted for the  
4 merger?

5 A. Yeah, for sure.

6 Q. How about today?

7 A. I believe that.

8 Q. How strongly?

9 A. Yeah, maybe more so given what I've seen happen to  
10 our results.

11 I can't remember who it was, it was a guy who was  
12 the CEO of United, who basically said that him and Delta  
13 were making 90 percent of the money that's being made in  
14 the airline business today. I'm certainly not. We're  
15 certainly not making any.

16 So I think bigger is a requirement of the -- of  
17 the ones who remain.

18 Q. Thank you, Mr. Gardner, I have no further  
19 questions.

20 THE COURT: Any redirect?

21 MS. MARKEL: Yes, your Honor, briefly.

22

23 REDIRECT EXAMINATION BY MS. MARKEL:

24 Q. Mr. Gardner, I have a couple of questions about  
25 the Judge's question to you on Demonstrative A, which is

1 behind Exhibit ADX.

2 A. Uh-huh.

3 Q. In our binder. So now the one --

4 A. No, hang on.

5 MR. COHEN: Your Honor, I think it is beyond the  
6 scope.

7 THE COURT: It's my question, she didn't have a  
8 chance to --

9 MR. COHEN: Oh, I'm sorry, your Honor, I didn't  
10 recall you asking it at the very end of her examination.

11 THE COURT: I did.

12 MR. COHEN: My apologies.

13 A. So what am I looking for?

14 Q. It will be behind Tab ADX. It is in evidence.  
15 But in your binder it's ADX. And it's Demonstrative A.

16 A. Yeah. (Looks.) I think I passed it.

17 Q. Oh, sorry, I apologize, it's AFR.

18 A. Okay, AFR. Okay. Yeah.

19 Q. Okay.

20 So if you take a look at Demonstrative Gardner A,  
21 do you recall the Judge asking you about the context for  
22 your text, "You know I was just thinking, do you think  
23 B6 would pay us something to get out of the deal?"

24 A. Yeah.

25 Q. And I think you testified that you believe that



1       this is related to the NEA trial, is that right?

2       A.       Well that's my memory at the time. And I know you  
3       asked me about this in my deposition and I honestly  
4       can't remember.

5       Q.       Well let's take a look at your deposition  
6       transcript.

7       A.       Okay.

8       Q.       Page 225.

9       A.       Here we go.

10      Q.       It's at the very end of your binder.

11      A.       Okay. (Looks.) Yes.

12      Q.       And so at your deposition, if you refer to Page  
13      225, Lines 13 to 16, were you asked these questions and  
14      did you give these answers.

15              Question, "You wrote that in the midst of the NEA  
16      trial, right?" Answer, "I did, but I don't think it was  
17      related to the NEA trial."

18      A.       Yeah.

19      Q.       Okay.

20      A.       I did tell them I thought it was tongue-and-cheek,  
21      which is what I sort of intended. But, yeah.

22      Q.       Thank you.

23              MS. MARKEL: I move for --

24              THE COURT: You thought it was "tongue and cheek"?

25              THE WITNESS: This says -- my answer in my

1 deposition was I was kidding. "Tongue and cheek,"  
2 meaning I wasn't serious.

3 MR. COHEN: Your Honor, for completeness may we  
4 read in Lines 10 to 12 at Page 325, for completeness and  
5 context?

6 THE COURT: I will take judicial notice of Lines  
7 10 through 25.

8 All right.

9 MS. MARKEL: Thank you.

10 THE COURT: Ms. Markel, anything else?

11 MS. MARKEL: Yes, your Honor, just briefly.

12 Q. So if you now turn to Defendants' binder --  
13 defense counsel's binder, so the other binder.

14 A. (Turns.)

15 Q. And if you turn to Tab 15 in that binder, Exhibit  
16 678, which your counsel asked you about.

17 A. Hang on. (Turns.) Yeah.

18 Q. Okay. And if you turn to -- and do you recall  
19 your counsel asking you a few questions about Spirit's  
20 profitability, um, expected profitability, right?

21 A. Yeah.

22 Q. Okay. So turn to Page 2. In the middle of the  
23 page there's a quote from Mr. Scott Harrelson who is  
24 Spirit's Chief Financial Officer.

25 Do you see that?

1 A. I do.

2 Q. And if you look at the last line in that  
3 paragraph, Mr. Harrelson said, is quoted as saying, "Our  
4 team is resilient and nimble and we are committed to  
5 returning Spirit to sustained profitability."

6 Do you see that?

7 A. I do.

8 Q. You would agree with that too, right?

9 A. That they're resilient and nimble and committed?  
10 Yes.

11 Q. Okay, thank you.

12 And Spirit hasn't disclosed any bankruptcy or  
13 going-concern risk in its latest filings, right?

14 A. No.

15 Q. Okay.

16 And your counsel also asked you a few questions  
17 about your role on Spirit's board. Do you remember  
18 that?

19 A. I do.

20 Q. And I think you mentioned, in response to one of  
21 his questions, that you were also a Spirit shareholder,  
22 right?

23 A. I am.

24 Q. And about how many shares do you own?

25 A. Um, 38,000, 40,000, something like that. Around

1       there.   Maybe a little less.

2       Q.       And if this deal goes through, you would get  
3       \$33.50 per share, right?

4       A.       Um, that would be the total.

5       Q.       And that's a significant premium compared to  
6       Spirit's current share price, right?

7       A.       It is.

8               MR. COHEN:   I'm going to object, your Honor.

9               THE COURT:   It's not timely.   We're going to let  
10       that stand.   I assume she's done with it.

11              MS. MARKEL:   I am done.   Thank you.   And no  
12       further questions.

13              MR. COHEN:   Nothing further, your Honor.

14              THE COURT:   Very well.

15              Now we will take the morning recess until 12:00.  
16       We'll stand in recess until 12:00.

17              (Recess, 11:45 a.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
do hereby certify that the foregoing record is a true  
and accurate transcription of my stenographic notes  
before Judge William G. Young, on Tuesday, November 7,  
2023, to the best of my skill and ability.

/s/ Richard H. Romanow 11-07-23  
\_\_\_\_\_  
RICHARD H. ROMANOW      Date